APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
UNIT B
(Former Fifth Circuit case, Section 9(1)
of Public Law 96-452—October 14, 1980.)

Cases Nos. 79-2429, 80-5297

ROGER L. SUMMER,

Plaintiff-Appellant/Appellee,

—v.—

LAND & LEISURE, INC., *et al.*,

Defendants-Appellant/
Cross-Appellants.

Before GODBOLD, Chief Judge, FRANK M. JOHNSON, Jr. and ANDERSON, Circuit Judges.

R. LANIER ANDERSON, III, Circuit Judge:

On February 23, 1978, appellant Roger L. Summer (referred to as "Summer" or "plaintiff" or "appellant") filed this complaint in the United States District Court for the Southern District of Florida. Subject matter jurisdiction was predicated on alleged violations of the federal securities laws; however, several state law claims were also asserted under the district court's pendent jurisdiction. Summer was an investor in Land & Leisure, Inc. ("L&L"). Between June 24, 1971, and January 3, 1973, he purchased, in eleven installments, a total of 9,500 shares of L&L common stock at a total cost of approximately

$54,000. L&L stock did not fare well over the years. In his complaint, Summer alleges a conspiracy or scheme among the several defendants to defraud investors and to conceal the fraud. Count I of the complaint alleges a claim under § 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C.A. § 78j(b), and Rule 10(b)-5 of the Securities and Exchange Commission; Counts II and VI allege claims of common law fraud; Counts III, IV and V allege claims under §§ 11, 12(2), and 17 of the Securities Act of 1933, 15 U.S.C.A. §§ 77k, 77l(2) and 77q; Count VII alleges a claim under the Florida Blue Sky Law, Fla. Stat. §§ 517.21 and 517.301; Count VIII is a state claim of mismanagement and breach of fiduciary duties by corporate officers and directors; and Count IX is a state law claim for breach of the corporate opportunity doctrine. Defendants are Land & Leisure, Inc., and Guy B. Bailey, Guy B. Bailey, Jr., Areca Stone Bailey, Charlotte Babcock, Robert Little, Jerome Grossman, and Robert Fischer, who were at one time or another officers or directors or both of L&L; and Raymond James Associates, Inc. ("Raymond"), the lead underwriters for L&L; and the accounting firm of Arthur Young & Co. which prepared the registration statement and prospectus for L&L. We sometimes refer to all defendants collectively as "defendants." We sometimes refer to all defendants except Arthur Young and Raymond as the "corporate defendants," i.e., the corporation, Land and Leisure, Inc., and its several officers or directors. Defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6). The district court granted the motion as to all the claims under federal law on the ground that they were barred on their face by the applicable statutes of limitations and, as there were no pending federal questions, exercised its discretion to dismiss the claims under state law. Furthermore, the district court determined that the complaint was frivolous and awarded attorney's fees and costs in favor of the defendants, except Little, in the aggregate amount of $32,480. *See* § 11(e) of the Securities Act of 1933, 15 U.S.C.A. § 77k(e).

I. Applicable Statutes of Limitations for Claims Under the Federal Securities Laws

Our first task is to determine the applicable statutes of limitations for the federal securities claims. We note that more than seven years elapsed between the first purchase of stock and the filing of the complaint, and more than five years passed from the last purchase of stock and the filing of the complaint.

A. The Section 10(b) Claims.

Since § 10(b) of the 1934 Act, 15 U.S.C.A. § 78j(b), provides no statute of limitations, we look to the most analogous state statute of limitations. Under Florida law, Fla. Stat. § 517.21, provides for a two-year statute of limitations on actions for violations of Florida securities laws. *See Nortek, Inc. v. Alexander Grant & Co.*, 532 F.2d 1013 (5th Cir.), *rehearing denied*, 536 F.2d 624 (1976). Section 517.21 was repealed on July 1, 1976, by Chapter 76-168, § 3 of the Laws of Florida of 1976. *See Vigman v. Community National Bank & Trust Co.*, 635 F.2d 455, 460 n.10 (5th Cir. 1981). Fla. Stat. § 95.-11 (5)(d) (amended 1975) provides for a three-year statute of limitations on actions for fraud. *See Vigman v. Community National Bank & Trust Co., supra.* We note that § 95.11(5)(d) was changed from three to four years on January 1, 1975. *See Vigman v. Community National Bank & Trust Co.*, 635 F.2d at 460 n.11. The district court applied the four-year statute. Since the last sale was on January 3, 1973, and since the complaint was filed on February 23, 1978, which is more than four years, the district court concluded that plaintiff's § 10(b) and Rule 10(b)-5 claims were barred. We need not decide which of the foregoing statutes of limitations apply in this case. Even assuming that the longest, the four-year statute, applies, it is clear that plaintiff's § 10(b) and Rule 10(b)-5 claims are barred, in the absence of circumstances which would toll the statutes.

B. The Section 17 Claims.

With respect to the claims under § 17 of the 1933 Act (a portion of Count III), the appropriate state statute of limitation also governs. *See Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036 (10th Cir. 1980); *Newman v. Prior*, 518 F.2d 97 (4th Cir. 1975). The district court correctly applied to the § 17 claims the same analysis as for the Section 10(b) and Rule 10(b)-5 claims. *See Nortek, Inc. v. Alexander Grant & Co.*, *supra*; *Turner v. Lundquist*, 377 F.2d 44 (9th Cir. 1967). Accordingly, the § 17 claims are also barred, unless the period was tolled.

C. The Section 11 and Section 12(2) Claims.

Sections 11 and 12(2) of the 1933 Act, 15 U.S.C.A. §§ 77k and 77l(2) (a portion of Count III, Count IV and Count V), however, are governed by the limitation period contained in § 13 of the 1933 Act, 15 U.S.C.A. § 77m, which provides:

> No action shall be maintained to enforce any liability created under § 77k or § 77l(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, . . . In no event shall any such action be brought to enforce a liability created under § 77k . . . of this title more than three years after the security was bona fide offered to the public, or under § 77l(2) of this title more than three years after the sale.

The district court held that the passage of more than three years between the alleged wrongful act and the commencing of this action is an absolute bar to the claims under §§ 11 and 12(2), *i.e.*, the normal rules of tolling do not apply after three years. Appellant does not seriously contest this ruling and it is consistent with a view of the majority of the courts to consider the question. *See Brown v. Producers Livestock Loan Co.*, 469 F.Supp. 27 (D. Utah 1978); *Turner v. First Wisconsin*

Mortgage Trust, 454 F.Supp. 899 (E.D. Wis. 1978); *Cowsar v. Regional Recreations, Inc.*, 65 F.R.D. 394 (M.D. La. 1974). The Tenth Circuit has interpreted the almost identical language in the Interstate Land Sales Full Disclosure Act to constitute an absolute bar. *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d at 1042-43. *But see In re Home-Stake Production Co. Securities Litigation*, 76 F.R.D. 337 (N.D. Okl. 1975). The Court in *Turner v. First Wisconsin Mortgage Trust*, *supra*, rejected the plaintiff's argument that the three-year period could be tolled by the defendant's concealment of the claim. "Otherwise [§ 13] would create a limitation period for all suits of one year from the time discovery of the untrue statements or omissions should have been made, and the three-year provision would serve no purpose at all." 454 F.Supp., at 911. We find this reasoning convincing. We hold that the normal tolling rules are not applicable to toll the three-year period. Accordingly, we hold that appellant's claims under § 11 and § 12(2) are absolutely barred and affirm the district court's dismissal of those claims.

II. Did Appellant Allege Sufficient Facts Which Would Toll the Statute of Limitations on the § 10(b) and § 17 Claims?

While we relied upon state law for the appropriate statute of limitations, federal law determines "when the clock starts to running" for purposes of the statute of limitations. *See Azalea Meats, Inc. v. Muscat*, 386 F.2d 5, 8 (5th Cir. 1967). "Under federal law, a cause of action under § 10(b) and Rule 10(b)-5 . . . accrues when the aggrieved party has either actual knowledge of the violation or notice of facts which, in the exercise of due diligence, would have led to actual knowledge thereof." *See Vigman v. Community National Bank & Trust Co.*, 635 F.2d at 459. Appellant claims that by the exercise of due diligence he did not discover the claims now asserted until 1977, within one year before the complaint was filed, and well within the appropriate statute of limitations whether it be two, three or four years.

We turn to the allegations of the complaint, particularly those of concealment of the facts by the defendants, which would tend to establish that plaintiff exercised due diligence in discovering the claims which he now asserts. The allegations throughout the complaint which would establish appellant's due diligence or concealment of facts by the corporate defendants fall into three categories:[1] (1) that the defendants conspired to fail to file required reports with the Securities and Exchange Commission, to fail to file and mail stockholders reports and proxy statements, and to fail to call annual stockholders meetings; (2) that defendants attempted to lull appellant by telling him that reports on L&L's financial condition would be forthcoming and that all was well with L&L; and (3) that defendants conspired to prevent the appellant from learning the true condition of the corporation by denying appellant access to corporate books and records, by falsely advising appellant that records had been lost or were unavailable, and by making false entries in the books and records. Appellant asserts, as a consequence of these actions, he did not reasonably discover the existence of the claims until 1977.

We are mindful of the standard for ruling on a Rule 12(b)(6) motion: "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-6, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). In granting the defendants' motion to dismiss the complaint pursuant to Rule 12(b)(6), the district court held, as a matter of law, that the

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1 The allegations of concealment are not contained within each and every count of the complaint; however, the allegations are contained at various points in the complaint. We believe it would be contrary to the liberal reading which we must give to a complaint upon motion to dismiss to consider the allegations of concealment only as to those counts in which the allegations are set forth. Having made such allegations with respect to some counts, and there being a reasonable inference that the allegations would likewise apply to the other counts, we surely cannot conclude that it appears beyond doubt that plaintiff can prove no set of facts which would entitle him to relief.

plaintiff was aware of facts which would have disclosed the alleged fraud. The facts relied upon by the district court were only three: first, Summer's knowledge that the defendant corporation did not hold annual stockholders' meetings; second, his knowledge that the defendant corporation did not send out annual stockholders' reports; and third, his knowledge of the sharp decline in the value of the stock.

With respect to the decline in the price of the Land and Leisure stock, we note that the bulk of Summer's purchases occurred after the substantial price decline, and that all the purchases were made through the underwriter, Raymond. It is a reasonable inference from the pleadings that the independent accounting firm, Arthur Young, continued to provide accounting services throughout the relevant time, including in particular after the time of the substantial price decline. If the price decline did not put the accounting firm and the underwriter on notice, it is a reasonable inference that it would not have put Summer on notice. We can conceive of several factual situations in which a price decline, under the circumstances here, would not be indicative of fraud in the least, *e.g.*, a depressed real estate market caused either by tight money or recession.[2]

With respect to the failure to send annual stockholders' reports and hold annual stockholders' meetings, none of the defendants have cited any case, nor have we found one, which holds that the mere failure to send such reports or hold such

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2 Defendants cite several cases in which a plaintiff's knowledge of the declining market price of securities has been a factor indicating that plaintiff had knowledge of facts which should have led to the discovering of the fraud. However, these cases apparently involved misrepresentations relating to the value of the securities—*e.g.*, that the investment would produce a stable income with no risk—so that sharp declines in value shortly after such misrepresentation would in fact tend to indicate that the representation was false. *See Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* 644 F.2d 690 (8th Cir. 1981); *Koke v. Stifel, Nicolaus & Co.*, 620 F.2d 1340 (8th Cir. 1980); *Jablon v. Dean Witter & Co.*, 614 F.2d 677 (9th Cir. 1980); and *Hupp v. Gray*, 500 F.2d 993 (7th Cir. 1974). In the instant case, a decline in market price is not inconsistent with the representations complained of nor otherwise suggestive of the fraud alleged.

meetings is sufficient to put an investor on notice of facts which in the exercise of due diligence would have led to actual knowledge of fraud.[3]

In the present posture of this case[4]—a Rule 12(b)(6) dismissal—the three facts relied upon by the district court are simply not sufficient to justify a conclusion that "it appears beyond doubt that the plaintiff can prove no set of facts" which would adequately explain why plaintiff did not become suspicious. In fact, Summer has made significant allegations tending to explain his lack of suspicion and tending to support his allegation of due diligence. As against all defendants, Summer has alleged generally a conspiracy to fraudulently conceal from plaintiff the material facts. As against the corporate defendants, Summer specifically alleged misrepresentations on numerous occasions that reports of financial condition would be forthcoming, that all was well with the defendant Land and Leisure, and that annual meetings would be forthcoming. In addition, Summer alleged that he was denied access to records, and that there were attempts to prevent him from learning the true financial condition by hiding records, removing records, making false entries in records, and misrepresenting that records were also lost or destroyed. Accordingly, we hold with respect to all defendants, except Arthur Young and Raymond, that the district court erred in dismissing plaintiff's complaint pursuant to Rule

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3 Arthur Young's reliance upon *Cook v. Avien, Inc.*, 573 F.2d 685 (1st Cir. 1978), is misplaced. *Cook* did not hold that the failure to hold a stockholder's meeting constituted notice. In *Cook*, a stockholders' meeting was in fact held, and plaintiff would have become aware of the misrepresentations had plaintiff attended. *Id.* at 696, n. 22. Nevertheless, the First Circuit declined to adopt an inflexible rule imputing such knowledge to a shareholder who did not attend the meeting, rather, the court held only that the failure to attend was one factor to be weighed adversely to plaintiff's diligence. *Id.* at 695, n. 21.

4 We note that most of the cases relied upon by the defendants were appeals from summary judgments rather than 12(b)(6) dismissals. The plaintiffs were allowed to support their claim with matters outside the pleadings.

12(b)(6). In *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5 (5th Cir. 1967), we stated:

> We disagree, however, with its disposition of the issue of due diligence on motions for summary judgment.
>
> Recognizing that "* * * the question whether a party had sufficient opportunity, so that in the exercise of reasonable diligence he would have discovered the facts forming the basis of his cause of action, may raise issues of fact which would have to be tried to a jury; * * *", the learned judge, on the facts contained in the record before us, treated it as a question of law to be determined by the court and arrived at the ultimate conclusion that:
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> "Considering the depositions, documents and affidavits filed herein, there can be no question that plaintiff was put on notice as to the facts constituting its alleged cause of action no later than early September, 1961." We note in passing that neither of the four cases relied upon by the trial court to support this result involved adjudication upon a motion for summary judgment.
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> The concept of due diligence is not imprisoned within the frame of a rigid standard; it is protean in application. A fraud which is flagrant and widely publicized may require the defrauded party to make immediate inquiry. On the other hand, one artfully concealed or convincingly practiced upon its victim may justify much greater inactivity. The presence of a fiduciary relationship or evidence of fraudulent concealment bears heavily on the issue of due diligence.

386 F.2d at 9 (footnotes omitted). Of course we express no opinion as to whether the record in the instant case on remand will develop such that the due diligence issue can be resolved on summary judgment, or whether a full trial will be necessary. However, we are confident that it was error to conclude that "it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Conley v. Gibson, 355 U.S. at 45-6, 78 S.Ct. at 101-02. Accordingly, the dismissal of the complaint was error with respect to all defendants except Arthur Young and Raymond.

Because the district court concluded that Summer had knowledge of facts which should have led to his discovery of the fraud, the district court did not address the subsidiary argument of Arthur Young and Raymond that the complaint contains only conclusory allegations as against those two defendants. We agree with Arthur Young and Raymond that the complaint includes only conclusory allegations of fraudulent concealment as against Arthur Young and Raymond. Rule 9(b), Fed. R. Civ. P., requires that the elements of fraud be pleaded with particularity. Accordingly, we affirm the judgment of the district court to the extent that it dismissed the complaint with respect to Arthur Young and Raymond, but we hold that on remand Summer be granted leave to amend to assert more particularized allegations as against Arthur Young and Raymond, if he can do so. See 2A Moore's Federal Practice, ¶ 9.03 (indicating that dismissal for failure to comply with Rule 9(b) is almost always with leave to amend).

III. The Other Issues on Appeal

Our disposition necessarily supplants the district court's determination that the complaint was without merit and that the defendants were entitled to attorney's fees. We therefore vacate the award of attorney's fees, which also makes it unnecessary for us to address the issues on cross-appeal relating to the amount of attorney's fees. Likewise, we reinstate the pendent state claims.

IV. Conclusion

We affirm the district court's dismissal of the § 11 and § 12(2) claims against all defendants. As against all defendants except Arthur Young and Raymond, we reverse the district court's dismissal of the § 10(b) and Rule 10 (b)-5 claims and the § 17 claims and remand for further proceedings not inconsistent with this opinion. As to Arthur Young and Raymond,

we affirm the dismissal of the § 10(b) and Rule 10(b)-5 claims and the § 17 claims, but direct that leave to amend be granted. The district court's award of attorney's fees is vacated. The pendent state claims are reinstated. All costs of this appeal shall be taxed against appellees.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

APPENDIX B

1. Order of May 2, 1979:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 78-810-Civ-JAG

ROGER L. SUMMER,

Plaintiff,

—v.—

LAND & LEISURE, INC., *et al.*,

Defendants.

ORDER

This cause came before the Court on the various Motions of the defendants to dismiss. This is an action brought pursuant to the Securities Act of 1933, the Securities Exchange Act of 1934, the Florida Blue Sky laws, F.S. 517.21 and F.S. 517.301 and pendent jurisdiction. More specifically, Count 1 of the Complaint is based on § 10b of the 1934 Act and Rule 10b-5; Count 2 is based on common law fraud; Count 3 is based on § 11 and § 17 of the 1933 Act; Count 4 is based on § 11 of the 1933 Act; Count 5 is based on § 12(2) of the 1933 Act; Count 6 is based on common law fraud; Count 7 is based on F.S. 517.21 and F.S. 517.301; Count 8 is based on the common law of Florida and Count 9 is also based on the common law of Florida.

The Court has carefully reviewed the 40 page Complaint, defendants' Motions to dismiss and the memoranda filed in support of and in opposition to the Motions to dismiss. The Motions to dismiss filed by the various defendants allege that

plaintiff's claims are all barred by the applicable statutes of limitations.

Count 1, as stated, is brought pursuant to § 10b of the 1934 Act, and Rule 10b-5. Since the 1934 Act does not have its own statute of limitations, the Court must look to the most closely analogous state statute of limitations, which in this case is F.S. 517.21 which provides a two year limitation period. *Nortek, Inc.* v. *Alexander Grant & Co.*, 532 F.2d 1013, 1015 (5th Cir. 1976). F.S. 517.21 was repealed, effective January 1, 1975, therefore the Court must apply a different statute subsequent to that date. Applying the statute of limitations for fraud, F.S. 95.11(3), the limitation period would be four years.

The Complaint states that plaintiff purchased an aggregate sum of 9,500 shares of common stock of defendant Land & Leisure. The first shares were purchased on June 24, 1971 and the last purchase was made on January 3, 1973. The Complaint was filed February 23, 1978. Applying the two year limitation period to all but the last purchase, plaintiff's claims for purchases from June 24, 1971 through December 27, 1972 are time barred. Applying the four year limitation period to the last sale on January 3, 1973, this claim is also time barred.

In determining when the clock starts to run for the purpose of applying a borrowed state statute of limitations for a federally created remedy, federal law controls. *Azalea Meats, Inc.* v. *Muscat*, 386 F.2d 5 (5th Cir. 1967). The statute of limitations in a § 10(b) action begins to run from the time a person has actual knowledge or notice of facts which, in the exercise of due diligence, would have led to actual knowledge of the violation. *Aboussie v. Aboussie*, 441 F.2d 150 (5th Cir. 1971).

The statute of limitations may be tolled by the equitable doctrine of fraudulent concealment. However, in order to invoke the doctrine, a party must have remained ignorant of the fraud without any fault or want of diligence or care on his part. A party may not merely rely on his own unawareness of the facts or law to toll the statute, but must show he has exercised reasonable care and diligence in seeking to learn the facts which would have disclosed the fraud. In other words,

the statutory period ". . . [does] not await the appellant's leisurely discovery of the full details of the alleged scheme . . .". *Klein v. Bower*, 421 F.2d 338, 343 (2d Cir. 1970).

Normally the concept of due diligence is one involving factual issues not appropriate for summary treatment. *See Azalea Meats, Inc., supra*. However, where it is clear from the face of the Complaint, plaintiff's own allegations, that plaintiff knew facts which should have put him on notice, dismissal is appropriate. *See Klein v. Bower, supra*; *Berry Petroleum v. Adams & Peck*, 518 F.2d 401, 412 (2d Cir. 1975).

Plaintiff, in his Complaint, alleged that defendants failed to send annual reports or call annual shareholders meetings, as well as failing to supply plaintiff with financial information requested. Defendants argue that these facts were sufficient to place plaintiff on notice and to preclude application of the tolling doctrine. Plaintiff knew in 1971 and 1972 of the defendants failure to send reports or have the shareholders meetings, and was aware of the sharp decline in the value of the stock. Plaintiff contends that this is an issue for trial.

As stated previously, plaintiff's § 10(b) and 10b-5 claim is barred by the limitation statutes, unless the statutes are tolled. Inasmuch as it appears from the face of the Complaint that plaintiff was aware of facts which would have disclosed the alleged fraud and therefore due diligence is absent, the Court finds that plaintiff's § 10(b) and 10b-5 claims are barred.

Counts 3, 4 and 5 are brought pursuant to § 11, 12(2) and 17 of the 1933 Act. As to § 17 of the Act, the state statute of limitations applies and as dicussed with regard to Count 1, the action pursuant to § 17 is also barred by that state statute of limitations. Actions brought pursuant to § 11 and 12(2) are governed by the statute of limitations set forth in § 13 of the 1933 Act which provides that an action must be brought within one year after discovery should have been made by the exercise of due diligence and further provides that nothing under § 11 or 12(1) shall be brought more than 3 years after the security was bona fide offered to the public or under § 12(2) within 3 years of the sale. As previously stated, the last sale in issue was on January 3, 1973 and plaintiff at that time was aware of

facts which would have lead to discovery of the untrue statements alleged to have been made. Accordingly, the tolling doctrine cannot apply and the actions brought pursuant to § 11 and 12(2) of the 1933 Act are barred by the statute of limitations set forth in § 13 of the Act.

Counts 2, 6, 8 and 9 based on common law fraud are before the Court pursuant to pendent jurisdiction. Inasmuch as the federal claims are barred by the statutes of limitations, these counts based on pendent jurisdiction must also be dismissed. Count 7 based on the Florida Blue Sky laws must be dismissed because the federal claims are barred and pendent jurisdiction does not exist. Furthermore, the claims based on F.S. 517.21 and F.S. 517.301 are also barred by the statute of limitations.

Accordingly, it is

ORDERED and ADJUDGED that defendants' Motions to dismiss are granted and this cause is hereby dismissed as barred by the statutes of limitations and lacking pendent jurisdiction.

DONE and ORDERED at Miami, Florida on this 2nd day of May, 1979.

/s/ JOSE A. GONZALEZ, JR.
District Judge

cc: all counsel

2. Order of January 30, 1980:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 78-810-CIV-JAG

ROGER L. SUMMER,

Plaintiff,

—v.—

LAND & LEISURE, INC., GUY BAILEY, SR., GUY BAILEY, JR., ROBERT LITTLE, JEROME GROSSMAN, ARECA STONE BAILEY, CHARLOTTE BABCOCK, ARTHUR YOUNG & COMPANY, RAYMOND JAMES & ASSOCIATES, INC., and ROBERT R. FISCHER,

Defendants.

ORDER

THIS CAUSE is before the Court on the respective Motions of various defendants pursuant to Section 11(e) of the Securities Act of 1933, 15 U.S.C. § 77k(e) which authorizes an award of reasonable attorneys' fees if the "court believes the suit or the defense to have been without merit . . ."

In determining that an award of attorneys' fees is appropriate the Court must find that the plaintiff "brought the action in bad faith or that the complaint, on its face, is without merit and thus unlikely to succeed." *Linchuck v. Cooper*, 43 FRD 382, 384 (S.D.N.Y. 1967). The cases considering an award of attorneys' fees in an action based on the Securities Act of 1933 unanimously hold that the statutory language "without merit" means "bordering on frivolity and not merely unconvincing." See *Klein v. Shields & Company*, 470 F.2d 1344, 1347 (2nd Cir. 1972).

The action in this case arose out of a purchase of securities made by plaintiff during a three-year period from 1971

through 1973. The complaint which was filed February 23, 1978, included allegations of violations of the Securities Act of 1933, the Securities Exchange Act of 1934, Florida Blue Sky laws and common law fraud.

The defendants moved to dismiss the case on the grounds that the action was barred by the applicable statutes of limitations.

On May 2, 1979, the Court granted the respective motions to dismiss.

Each count of the complaint is barred by the statutes of limitations. Further the complaint fails to allege facts indicating that the statute should be tolled due to the equitable doctrine of fraudulent concealment. On the contrary, the complaint shows that the plaintiff knew or reasonably should have known of the alleged violations in 1971 and 1972. For example, the complaint states that the defendants did not supply annual reports, or also furnish requested financial information. Plaintiff alleged that no shareholders' meetings occurred from 1971 to the time the complaint was filed. Plaintiff was aware of the sharp decline in the stock's value.

Plaintiff's cause of action, brought six years after the time when plaintiff should have been placed on notice of defendant's wrongdoing, is clearly barred by the statute of limitations. See this Court's order herein dated May 2, 1979.

For the reasons given in the Order of May 2, 1979, the Court finds that this complaint is on its face without merit and thus unlikely to succeed. Furthermore, the complaint is frivolous as a matter of law.

It is thereupon

ORDERED AND ADJUDGED that the Motions of defendants' Raymond James & Associates, Inc., Jerome Grossman, Arthur Young & Company, Charlotte Babcock, Areca Stone Bailey, Guy B. Bailey, Sr., Guy B. Bailey, Jr., Robert R. Fischer, and Land & Leisure, Inc. to award attorneys' fees are hereby GRANTED.

The respective defendants are directed to submit affidavits as to attorneys' fees within ten days setting forth the time

expended in defense of this matter together with an itemized list of the costs incurred.

DONE AND ORDERED in Chambers at the U.S. District Courthouse, Fort Lauderdale, Florida, this 30th day of January, 1980.

/s/ JOSE A. GONZALEZ, JR.
U.S. DISTRICT JUDGE

Copies furnished counsel

APPENDIX C

Excerpts from Summer's Complaint

Count III, Paragraph 30, in relevant part:

From the time the misrepresentations were made in the Prospectus until in or about October 1977, the Defendants LITTLE, ARTHUR YOUNG and RAYMOND, JAMES and each of them, aided and abetted by the others, engaged in a continuing course of conduct to graudulently [Sic] conceal the true financial condition of Defendant LAND & LEISURE from Plaintiff, and to prevent the Plaintiff from discovering any information regarding the affairs and status of Defendant LAND & LEISURE. Defendants, and each of them accomplished this concealment by causing the Defendant LAND & LEISURE to fail to file Annual Reports on Form 10-K, quarterly reports on Form 10-Q, current reports on Form 8-K, annual reports to shareholders, proxy statements to shareholders, all as required under the Rules and Regulations of the SEC pursuant to the authority of the Securities Act of 1933 and the Securities Exchange Act of 1934, and further, in clear violation of the laws of the State of Florida as well as the aforementioned Federal Securities laws, failed to call or and hold a shareholders' meeting at any time from 1971 to and including the date of this pleading.

Count IV, Paragraph 41:

Plaintiff did not discover the falsity of the representations contained in the Prospectus until in or about October, 1977. Plaintiff could not reasonably have discovered the falsity of such representations contained in the Prospectus since the Defendants ROBERT LITTLE, JEROME GROSSMAN, ARTHUR YOUNG, RAYMOND, JAMES, and LAND & LEISURE, and each of them, at all times material herein had engaged in continuing course of conduct and conspiracy to fraudulently conceal from the Plaintiff those misstatements of

material fact and omissions of material fact necessary in order to make the statements made therein not misleading in substantially the following manner.

(a) At a meeting of the Board of Directors of Defendant LAND & LEISURE held on or about October 12, 1971, a discussion was held by the then present Directors concerning the sale of Defendant LAND & LEISURE of 112 unregistered units of land in volation of the laws of the State of Florida. Further, the Directors discussed at said meeting a disclosure of such information could require LAND & LEISURE to make offers of recision to all who purchased such units of land and thereby effectively close Defendant LAND & LEISURE and abort the public offering then proceeding.

(b) Further, at the meeting of October 12, 1971, as aforesaid, it was disclosed that as a result of such sales of unregistered land, the sale of the collateralized subordinated sinking fund debentures had been suspended in August, 1971 by the unilateral act of the Defendant RAYMOND, JAMES.

(c) Notwithstanding the materiality of the foregoing events, no posteffective amendment of the Registration Statement and Prospectus then in effect was filed, nor was any current report on Form 8-K filed with the SEC, nor was any public disclosure of same made by the Defendants to Plaintiff, and the Plaintiff continued to make purchases of stock of Defendant LAND & LEISURE on or after said date, relying upon the Prospectus.

(d) On December 22, 1971, a meeting of the Board of Directors of Defendant LAND & LEISURE was held. At such meeting it was disclosed that Defendant LAND & LEISURE used for its general operating purposes, $220,000 of funds received from third party purchasers of its land, which funds should have been placed in a special escrow account to conform to Florida Land Sales Board requirements.

(e) It was further disclosed at the said meeting of December 22, 1971, that property represented to third party purchasers of tracts of land in WESTFIELD III as free and clear, was in fact encumbered by two mortgages and as a result thereof, the Defendant LAND & LEISURE was faced with having to rescind all WESTFIELD III sales and refund the purchase monies therefor to third party purchasers, which money Defendant LAND & LEISURE did not have.

(f) It was further disclosed at the said Board of Directors meeting of December 22, 1971, that the Defendant ROBERT LITTLE was on information and belief, using Defendant LAND & LEISURE as a vehicle for moving money into the United States from a Jamaican or Bahamian corporation, or both, ("laundering") for his own benefit, which money should have been taxed, but was not, and as a result, the Defendant LAND & LEISURE faced potential serious tax consequences with the United States Internal Revenue Service. At said meeting the hiring of special tax counsel to determine what liability, if any, was faced by the Defendant LAND & LEISURE as a result of these actions of the Defendant ROBERT LITTLE was discussed, however, no affirmative action was taken by the Board of Directors.

(g) As a result of the foregoing matters, the Board of Directors of the Defendant LAND & LEISURE should properly have publicly disclosed the aforementioned information through the filing of appropriate reports with the SEC on Form 8-K, and making a public announcement. Notwithstanding the said obligation, no matter was ever filed or disclosed to the public and the Plaintiff continued to make purchases of stock of the Defendant LAND & LEISURE after the date of said meetings.

(h) On or about February 15, 1972, a meeting of the Board of Directors of Defendant LAND & LEISURE was held. At this meeting the question of public disclosure of

the financial difficulties, as well as the other difficulties of Defendant LAND & LEISURE, as set forth hereinabove, were discussed and the aforesaid Defendants failed and refused to take the steps necessary to make public disclosure of the financial and other difficulties of the Defendant LAND & LEISURE, and in truth and fact, took affirmative action to keep such information from becoming public.

(i) On or about February 16, 1972, control of the Defendant LAND & LEISURE was sold to UNITED RESOURCES, INC., a Florida corporation. Control was acquired by the sale of the stock of certain insiders, to wit, Defendant ROBERT LITTLE, one L. R. BROOKS, Defendant JEROME GROSSMAN, and CORDWELL INTERNATIONAL DEVELOPMENTS, LTD. At said meeting UNITED RESOURCES, INC. caused the resignation of Defendant ROBERT LITTLE, and one THOMAS HAMILTON, OSCAR CORDERA, ARTHUR PAPAZIAN, and JACK LASONDER. In the places of the aforementioned Directors of the Defendant LAND & LEISURE, UNITED RESOURCES, INC. caused the election of the following individuals to the Board of Directors of the Defendant LAND & LEISURE, all of whom accepted their office, and served as Directors of the Defendant LAND & LEISURE at all times material herein, to wit, the Defendants GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY, and CHARLOTTE BABCOCK, as well as one STEVEN W. ARKEY. Upon information and belief Mr. ARKEY subsequently resigned his position as a Director of the Defendant LAND & LEISURE on or about February 17, 1972.

(j) Upon information and belief, the new Board of Directors, GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY and CHARLOTTE BABCOCK, knew or should have known, by the exercise of ordinary care, of the misstatements of material fact and of the omissions of material facts necessary in order to

make the statements made not misleading as contained in the Prospectus. That these Defendants knew or should have known or said misstatements and omissions is established by their admission at the Board of Directors' meeting of February 16, 1972, that they at all times were aware of the true condition of the Defendant LAND & LEISURE. Further, these Defendants, BAILEY, SR., BAILEY, JR., ARECA STONE BAILEY and CHARLOTTE BABCOCK, knew or should have known that those items as set forth hereinabove should have been disclosed by the filing of a posteffective amendment to the Registration Statement, or the filing of a current report on Form 8-K or through other public announcement. Notwithstanding the foregoing, the Defendants GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY, and CHARLOTTE BABCOCK, joined in and continued the scheme and conspiracy to prevent disclosure of the true condition of the Defendant LAND & LEISURE to the investing public as well as this Plaintiff, and were aided and abetted in this regard by the Defendants ROBERT LITTLE, JEROME GROSSMAN, ARTHUR YOUNG, and RAYMOND, JAMES, in order to protect the investment of UNITED RESOURCES, INC. (of which the Defendants BAILEY, SR., BAILEY, JR., ARECA STONE BAILEY, and CHARLOTTE BABCOCK owned approximately 90% of the issued and outstanding stock) in the Defendant LAND & LEISURE.

(k) In order to accomplish the foregoing, the Defendants GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY, and CHARLOTTE BABCOCK, from on or about February 16, 1972 to date, conspired with the former officers and directors of the Defendant LAND & LEISURE, to wit, ROBERT FISCHER, ROBERT LITTLE, and JEROME GROSSMAN, as well as with the lead underwriter of the Defendant LAND & LEISURE'S public offering, to wit, RAYMOND, JAMES, as well as with a new employee of the Defendant LAND &

LEISURE, to wit, ROBERT FISCHER, and the accounting auditing firm of the Defendant LAND & LEISURE, ARTHUR YOUNG, whereby LAND & LEISURE would not prepare nor file documents with the SEC notwithstanding the clear requirements of the Securities Act and the Exchange Act and the rules and regulations promulgated thereunder. In addition the Defendants further caused the Defendant LAND & LEISURE to fail to file and mail to shareholders annual reports detailing its financial condition as of a date certain, caused the Defendant LAND & LEISURE to fail to file and mail to shareholders proxy statements as required under Section 14 of the Exchange Act, and further, the Defendants BAILEY, SR., BAILEY, JR., ARECA STONE BAILEY, CHARLOTTE BABCOCK and ROBERT FISCHER, by virtue of their control of the Defendant LAND & LEISURE, caused LAND & LEISURE to fail to call a single annual meeting of shareholders during the period February 16, 1972 to date, notwithstanding the clear requirements for an annual meeting of shareholders under applicable Federal and State law as well as under the By-Laws of the Defendant LAND & LEISURE.

(l) In addition, the Defendant GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY, CHARLOTTE BABCOCK, and ROBERT FISCHER, in their capacities as directors and/or officers of the Defendant LAND & LEISURE took affirmative action to prevent your Plaintiff from learning anything at all about the true condition of the Defendant LAND & LEISURE through the means and instrumentalities of interstate commerce, including the mails and telephonic communication, whereby they represented to your plaintiff on numerous occasions that reports on the financial condition would be forthcoming, that all was well with the Defendant LAND & LEISURE, and that annual meetings of shareholders as well as SEC reports would be forthcoming, when in truth and fact, they, and each of

them, knew or should have known in the exercise of ordinary care that such was not the case.

(m) Plaintiff was denied access to the books and records of the Defendant LAND & LEISURE, until suit was instituted in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in a case styled "Roger L. Summer v. Land & Leisure, Inc. and Robert R. Fischer", Case No. 77-14177. Even after your Plaintiff was allowed access to the books and records, the Defendant ROBERT FISCHER, aided and abetted by others whose names are presently unknown to your Plaintiff, attempted to prevent your Plaintiff from learning the true condition of the Defendant LAND & LEISURE by hiding records from your Plaintiff, by removing records supplied to the Plaintiff and hiding same, by deliberately and/or negligently causing false entries to be made in the books and records of the Defendant LAND & LEISURE, AND BY DELIBERATELY ADVISING YOUR Plaintiff that certain books and records were lost or destroyed when in truth and fact the same were in the possession, custody and control of the Defendant LAND & LEISURE, or its officers, employees or agents. At the time the false and misleading misrepresentations and omissions of material fact necessary in order to make the facts contained therein not misleading were made, they were known to the Defendants to be false and misleading, and were made by the Defendants with the intent to deceive and defraud the general public, purchasers of stock and debentures of the Defendant LAND & LEISURE in connection with the public offering then proceeding, and in particular, this Plaintiff.